IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.492 OF 2003
IN
SUMMARY SUIT NO.1113 OF 2003

Mulraj G. Jasani and another Plaintiff

versus

Manish Kanji Gala and another Defendants

Ms.Nita Solanki i/by Kiran Jain & Co. for plaintiff
Mr.M.D.Angal for defendants.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 13th June 2005

PC :

1. Learned counsel appearing for the plaintiff states that a decree has already been passed against second defendant and this summons for judgement is directed only against first defendant.

2. Learned counsel submits that the second defendant and first defendant are brothers. They were in financial difficulties and therefore, some time in April 1999 approached the plaintiffs for financial assistance. A sum of Rs.4.00 lakh was handed over by cheque to the defendants and it is the contention of the plaintiffs' counsel

that the said cheque has been deposited in the account of first defendant and duly encashed.

3. In consideration of this, a demand promissory note was executed on 6th April 1999 in favour of second plaintiff for valuable consideration. The debt is duly acknowledged and that interest also was agreed to be paid @ 1.35% per month. She submits that the defendants having utilised this amount advanced by cheque, they forwarded from time to time the amount of interest and that too by cheques. However, the second defendant handed over a cheque of Rs.4.00 lakh in discharge of the liability, but the said cheque having been dishonoured, a notice was issued to both the defendants. Since there was no reply nor was there any compliance, present summary suit was filed on 21st March 2003. The date of the cheque is 23rd March 2002. She submits that as far as second defendant is concerned, a decree was passed by this Court in favour of the plaintiffs on 20th February 2004. The claim, therefore, is now restricted as against first defendant.

4. Mr.Angal, learned counsel appearing for the first defendant submits that it is true that a promissory note was executed, but the promissory

note was signed and executed by first defendant alone. Thereafter the second defendant has also signed. He submits that the liability, if any, is of the second defendant. He submits that the entire sum was to be utilised by the second defendant and this fact was made amply clear. He invites my attention to the replies given to a notice addressed by the plaintiffs and submits that the liability, if any, of the first defendant ceases the moment the cheque of Rs.4.00 lakh was handed over by the second defendant alone.

5. Learned counsel appearing for the plaintiffs controverts this submission and contends that in the rejoinder affidavit it is categorically pointed out that it is the first defendant who has deposited the cheque issued by the plaintiff in his account. The first defendant and the second defendant are brothers. A false story is now set up that the liability of the first defendant ceases upon handing over of the cheque.

6. In my view, it is clear that a cheque of Rs.4.00 lakh was handed over by the plaintiffs and the amount of interest has been paid after the promissory note has been executed. The

promissory note is admittedly executed by the first defendant. However, a cheque of Rs.4.00 lakh was handed over by the second defendant. A decree is passed against the second defendant because he has failed to contest the summary suit. Insofar as first defendant is concerned, he has on 17th April 2002 addressed a letter replying to the plaintiffs' notice. First defendant contends that the whole basis of the transaction is that the rate of interest of 1.35% was to be bifurcated inasmuch as interest 1.25% per month was to be retained as interest by plaintiffs and 0.10% per month was to be paid to the first defendant as brokerage. It is not a case where there was any privity other than this between the plaintiffs and first defendant. Since this defendant has annexed correspondence prior to the filing of the suit and it is contended that the cheques towards interest were handed over to the plaintiffs with this understanding, interest of justice would be served if one opportunity is given to the first defendant to make good this case. The defence as raised is based upon prior correspondence. Although, execution of the promissory note is not disputed, since claim is set up based of brokerage which is subject matter of

correspondence prior to the institution of suit, conditional leave to defend is granted to the first defendant. I am taking this view also in the light of the fact that a decree has been passed against second defendant.

7. Considering above, following order :-

A) On the first defendant depositing a sum of Rs.2.50 lakh within a period of eight weeks from today in this Court, conditional leave to defend the suit is granted.

B) On such deposit, the suit shall stand transferred to the list of small causes with usual directions pertaining to written statement, discovery, inspection etc..

C) Needless to state that if the said amount is not deposited further consequences in law would follow. Summons for judgement is made absolute in the above terms. No order as to costs. Liberty to the plaintiff to apply for appropriate orders and directions

including withdrawal of the amount deposited after twelve weeks.

(S.C.DHARMADHIKARI, J.)